purchaser is entitled to the deposit in the absence of any express stipulation to the contrary in the contract.

The contract in the present case contained no express stipulation as to what was to become of the deposit in the event of the purchaser making default. Money paid as a deposit must, however, according to the view expressed by Fry F.J. in *Howe* v. *Smith*,[2] be paid on some terms implied or expressed, and in a case where no terms are expressed it becomes necessary to inquire what terms are to be implied. The answer to this inquiry is to be found in the words which follow the statements in the judgment of Fry L.J. to which I have just referred. They are as follows (at page 101) :—

"The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the prayer to perform the rest of the contract."

The observations of Cotton L.J. are to the same effect when he says (at page 95) :—

"What is the deposit? The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit."

Bowen L.J. said in the same case (at page 98) :—

"We have therefore to consider what in ordinary parlance, and as used in an ordinary contract of sale, is the meaning which business persons would attach to the term "deposit." Without going at length into the history, or accepting all that has been said or will be said by the other members of the court on that point, it comes shortly to this, that a deposit, if nothing more is said about it, is, according to the ordinary interpretation of business men, a security for the completion of the purchase. But in what sense is it a security for the completion of the purchase? It is quite certain that the purchaser cannot insist on abandoning his contract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong. Mr. Pearson said the rule is different when the purchaser does not insist on abandoning his contract, but, on the contrary, is desirous, at the moment he appears before the court, of completing it, and therefore neither the principle nor the decisions apply — that this is not a case where the purchaser is receding from the contract, but on the contrary he is seeking to enforce it. It seems to me the answer to that argument is that although in terms in a case like the present the purchaser may appear to be insisting on his contract, in reality he has so conducted himself under it as to have refused, and has given the other side the right to say that he has refused, performance. He may look as if he wished to perform, but in reality he has put it out of his power to do so — he has, in the language of the *Roman* law, receded from his contract."

As the defendant in the present case had paid more than 30% of the agreed purchase price I felt a bit hesitant at first to make an order for a forfeiture of the whole amount, but in view of the fact that he had been in possession of the premises from the date of the agreement for a period of very nearly three years and six months I considered it just and reasonable that the whole amount should be forfeited to the plaintiff.

For the reasons I have stated and in all the circumstances of the case I made an order in terms of the motion by the plaintiff.

Order in terms.

Solicitors: *Sault, Keith Sellar & Co.*

SUNDARAM v. CHEW CHOO KHOON

[O.C.J. (Chang Min Tat J.) July 29, 1968]
[Ipoh — Civil Suit No. 232 of 1967]

Moneylenders — Suit for declaration that charges executed were void — Application to stay proceedings on the grounds of frivolity and vexation — Plea of estoppel — Whether proper.

Practice and Procedure — Pleading evidence and not material facts — Striking out of objectionable parts — R.S.C. 1957 O. 19 r. 4.

Evidence — Estoppel — Consent judgment — When cannot give rise to estoppel.

The plaintiff brought an action against the defendant for a declaration that the 3 charges executed by him in favour of the defendant over a piece of land at Sungei Siput for $30,000, $20,000 and $10,000 respectively were void and unenforceable by reason of the defendant being an unlicensed moneylender and for ancillary reliefs. The defendant (who had not filed a defence) sought in this application an order to stay all further proceedings in the action on the grounds of frivolity and vexation and abuse of the process of court or alternatively to amend or strike out certain paragraphs of the statement of claim on the grounds that they were contrary to the rules of pleading and an abuse.

It was contended in support of the first ground on behalf of the defendant that the plaintiff was estopped from relying on the allegations that the defendant was an unlicensed moneylender and of fraud by the consent judgment in the earlier action between the parties namely Ipoh Civil Suit No. 494 of 1965.

Held: (1) there was nothing in the consent judgment in Ipoh Civil Suit 494 of 1965 which necessarily and with complete precision decided the issue in the case in question. The defence in the said suit referred to the three charges but the nature and character of the charges were not then called in question. The said consent judgment cannot give rise to an estoppel to exclude a plea based on the Moneylenders Ordinance;

(2) in pleading facts other than the actual rate of interest charged and in pleading the negotiations which took place between the defendant and the plaintiff's brother, the plaintiff was pleading evidence and not material facts. The second objection therefore succeeds.

Cases referred to:—

(1) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] M.L.J. 49.

(2) *Lee Sock Goh* v. *Straits Cabaret (1953) Ltd.* [1965] 2 M.L.J. 3.

(3) *Roe* v. *The Mutual Loan Fund Ltd.* (1887), 19 Q.B.D. 347.

(4) *Davy* v. *Garrett* (1887-8), 7 Ch. D. 473, 489.

CIVIL SUIT.

N. Sharma for the plaintiff.

Lim Kean Chye for the defendant.

Cur. Adv. Vult.

Chang Min Tat J.: This is an application by the defendant for an order (1) to stay all further proceedings in the action on the grounds of frivolity and vexation and abuse of the process of court, or (2) alternatively to amend or strike out certain specific paragraphs of the statement of claim on the grounds that they are contrary to the rules of pleadings and an abuse.

The action by the plaintiff is for a declaration that the three charges executed by him in favour of the defendant over a piece of land held under E.M.R. No. 721 for Lot No. 3379, in the Mukim of Sungei Siput in the District of Kuala Kangsar for $30,000, $20,000 and $10,000 respectively are void and unenforceable by reason of the defendant being an unlicensed moneylender, and for ancillary reliefs. The writ was sued out on the 12th May 1967 and the statement of claim delivered on the 7th July 1967.

In paragraph 1 of the statement of claim the plaintiff avers that the first charge to secure the repayment of $30,000 was made on the agreement exacted from him to pay over and above the expressed interest of 12% per annum additional interest originally fixed at $600 a month and later increased to $660 a month. Paragraphs 2 and 3 refer in almost identical terms and averments to the second charge for $20,000. Paragraph 4 alleges the circumstances under which the third charge for $10,000 was executed as alleged in paragraph 5. They include averments of an agreement of 10th March 1961 whereby the defendant was to receive a tribute on iron-ore and an agreement of 15th January 1964 whereby the defendant was alleged to have "adjusted" the advance of $20,000 by this third charge of $10,000. It was further alleged that the additional interest on the $50,000 previously advanced was reduced from $1,100 *per mensem* to $1,000 *per mensem*. The loans are alleged to have been negotiated by the plaintiff's brother. Paragraph 6 refers to two letters of acknowledgement by the plaintiff that the defendant was not a moneylender and avers that the letters were obtained by the fraud of the defendant. Particulars of fraud are given.

As for the remaining paragraphs of the statement of claim, no objection is and as far as I can see, can be taken and it is not necessary to refer to them.

No defence to date has been filed and an application for judgment (Enclosure 15) in default of defence has, by consent, been stood over until the determination of this application.

I must now refer to the history of the prolonged litigation between the parties. Prior to the institution of the action herein the defendant had applied, in Foreclosure Application No. 5 of 1966 to the Collector of Land Revenue, Kuala Kangsar, under section 260 of the National Land Code for the sale of the land to realise moneys therefrom to pay off the charges. It is clear that this action was initiated to abort the foreclosure application or as another attack in another forum against the validity of the charges. Shortly after filing the action, the plaintiff applied to the High Court in this action by way of a Summons-in-Chambers to stay all proceedings in the foreclosure application. The Summons-in-Chambers was, in the light of the proceedings which had been reached before the Collector of Land Revenue at the time of the summons, dismissed by me. In the affidavits in support of and opposing the application, reference was made to an earlier action, Ipoh High Court Civil Suit No. 494 of 1965 between the parties, and it would appear that in this earlier action after marches and counter-marches if I may so describe the various steps taken, the consent judgment of MacIntyre J. (as he then was) in favour of the present defendant remained in force, when the appeal therefrom to the Federal Court was withdrawn by the plaintiff.

Now this earlier action was a claim by the defendant against the plaintiff for repayment of various sums of money amounting to $6,260.72 paid by the defendant to the Malayan Banking Ltd. at the request of and on behalf of the plaintiff and also incurred by the defendant for the plaintiff. The defences to the action were a denial of the debt and reliance on the Moneylenders Ordinance. Paragraph 3 of the defence referred to the two letters of acknowledgment signed by the plaintiff that the defendant was not a moneylender and averred that the letters were obtained by the defendant by fraud in the course of making the loans secured in the first two charges for $30,000 and $20,000 respectively. There were other averments of facts and allegations of further acts of fraud but these are not relevant in the application before me.

It is now contended before me on behalf of the defendant that the plaintiff is now estopped from relying on the allegations that the defendant is an unlicensed moneylender and fraud by the consent judgment in the earlier action.

Counsel for the plaintiff submits that estoppel which must be specifically raised as a defence cannot be relied on in an application for stay and in any event could not apply where the cause of action is different from that in the earlier action.

My attention was subsequently drawn to the Privy Council decision in *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.*[1] but it was nevertheless urged that on the authority of the decision of Ambrose J. in *Lee Sock Goh* v. *Straits Cabaret (1953) Ltd.*,[2] it did not apply to a consent judgment. Now *Kok Hoong's* is a case of a default judgment and the Privy Council upheld the decision of the Federal Court that there was nothing in the first judgment which "necessarily and with complete precision" decided the issue against the party who was in default in the earlier case.

In the present case the issues are of moneylending and fraud and it is urged, they are the self-same issues that were raised in the earlier case. It is undoubted that a default judgment is capable of giving rise to an estoppel *per rem judicatam*, and if a default judgment, more so a consent judgment. In the *Straits Cabaret case*, Ambrose J. applied the doctrine of estoppel against the tenant who in an earlier action in respect of the same premises had abandoned her defence that the premises were controlled premises and had not suffered such a change of identity as a result of structural alterations as to take them outside the protection of the Control of Rent Ordinance. In the circumstances of the case the learned judge refused to allow the tenant to rely on the Control of Rent Ordinance, to "resile from the election made by her and resuscitate a plea which was abandoned by her and re-open the litigation which was intended by both parties to be brought to an end by the consent judgment." With respect, it seems to me that the facts in the *Straits Cabaret* case so closely resembles those in *Roe* v. *The Mutual Loan Fund Limited* [3] that Ambrose J. felt bound by the decision therein that the doctrine of estoppel operated in a defence which relied on the infringement of the Bills of Sale Act to allow it to apply against a defence based on the Control of Rent Ordinance. It would however appear in the decision of Viscount Radcliffe in *Kok Hoong's* case that in the view of their Lordships, *Roe's* case was a departure from the general rule and was decided on the facts of the case, the general rule being:—

> "There can be no estoppel in face of the Moneylenders Ordinance, since the provisions on which the respondent seeks to rely render him a 'protected person' for this purpose, nor any estoppel in the face of the Bills of Sale Ordinance, the provisions of which, whatever other purposes they may serve, are at least intended for the protection of other creditors who may have dealings with the borrower."

Now this was the other ground which decided their Lordships to dismiss the appeal in *Kok Hoong's* case.

On both grounds, it does not appear to me that the defendant can succeed. I can see nothing in the judgment in Ipoh Civil Suit No. 494 of 1965 which "necessarily and with complete precision" decided the issue in the case in question. In the earlier case, the issue was whether the transaction which was the advance of a sum of $6,260.72 for and on behalf of the plaintiff was so tainted by breaches of the Moneylender Ordinance as to make it unenforceable in a court of law. The defence therein referred to the charges but the nature and character of the charges were not then called in question. Further I can see no parallel between the plaintiff's action in the present case with the proceedings of the tenant in the *Straits Cabaret* case or of the debtor in *Roe's* case. The consent judgment in Civil Suit No. 494 of 1965 cannot, in my view, give rise to an estoppel to exclude a plea based on the Moneylenders Ordinance.

Accordingly, the first objection fails.

On the second objection, the defendant appears to be more firmly grounded. It is a clear rule of pleading that material facts and not evidence are to be pleaded. Order 19 Rule 4 of the Rules of the Supreme Court, 1957, states that "any pleading shall contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be." It seems to me that in pleading facts other than the actual rate of interest charged, and in pleading the negotiations which took place between the defendant and the plaintiff's brother, the plaintiff was pleading evidence and not material facts. Further, it seems to me that the fraud alleged by the plaintiff in the context of his claim is more correctly of the nature of duress. The action of the defendant in obtaining the signature of the plaintiff to an acknowledgment that he the defendant was not a moneylender could not come within the definition of fraud in *Davy* v. *Garrett* [4] as "an allegation that the defendant made to the plaintiff representations on which he intended the plaintiff to act which representations were untrue and known to the defendant to be untrue." In any event, the allegations with respect to these letters anticipate without justification or necessity any averment by the defendant based on them and should more properly be set out in any reply to such averment if and when made.

In my view the second objection succeeds. I propose to leave it to counsel to settle between themselves what are material facts and what is

evidence. There will be liberty to apply after such settlement or failing such settlement after the necessary attempts to reach a settlement.

Order accordingly.

Solicitors: *N. Sharma; S. N. Leow.*

PUBLIC PROSECUTOR v. HAMBALI & ANOR.

[A.Cr.J. (Chang Min Tat J.) August 2, 1968]
[Ipoh — Criminal Appeal No. 21 of 1968]

Evidence — Fact specially within the knowledge of person — Charge of using vehicle without third party insurance — Production of insurance policy — Evidence Ordinance, 1950, s. 106.

Evidence — Admissibility — Police investigation — Criminal Procedure Code (Cap. 6), s. 113.

In this case the learned magistrate acquitted the respondents on a charge of using a motor cycle without a valid policy of insurance against third party risks, as he found that there was no proof that the police had demanded for the policy of insurance.

Held: the onus of proving that there was a policy was on the accused in this case and there was no necessity for the prosecution to give *prima facie* evidence of the non-existence of the policy.

Cases referred to:—

(1) *R.* v. *Oliver* [1943] 2 All E.R. 800.

(2) *Williams* v. *The East India Company* (1802), 3 East 192; 102 E.R. 200.

(3) *R.* v. *Turner* (1816), 5 M. & S. 206; 105 E.R. 211.

(4) *Williams* v. *Russell* (1933), 149 L.T. 190, 191.

(5) *John* v. *Humpreys* [1955] 1 All E.R. 793, 794.

(6) *Khoo Teck Yam* v. *Public Prosecutor* [1955] M.L.J. 112.

MAGISTRATE'S CRIMINAL APPEAL.

Eusoff bin Chin (Deputy Public Prosecutor) for the appellant.

S. A. Lingam for the respondent.

Cur. Adv. Vult.

Chang Min Tat J.: The 1st respondent was charged with two offences, the first for riding a motor-cycle without being the holder of a driving licence and the second with using the motor-cycle without a valid policy of insurance against third party risks. In connection with these charges, the 2nd respondent was charged as owner of the motor-cycle also with two offences, the first with permitting the 1st respondent to use it without a driving licence and the second without a valid policy of insurance.

At the conclusion of the case for the prosecution, the learned magistrate called for the 1st respondent to enter on his defence to the first charge but acquitted him on the second charge without his defence being called and he also acquitted the 2nd respondent on both charges similarly without his defence. At the conclusion of the trial, the 1st respondent was convicted on the first charge and fined $50 or in default, 1 week's imprisonment.

Against the orders of acquittal and discharge, the Public Prosecutor now appeals.

In the court below, the prosecution had adduced evidence that on specific instructions, PW..1 (police constable 18919 Othman bin Abdul Rahman) went in search of the rider of the motor-cycle and found it travelling on Changkat Jong Road in Teluk Anson near the Lower Perak Club junction. He ordered it to stop but the rider refused. P.W.1 then followed the motor-cycle and found it stopped at a junction. He first demanded from the rider his driving licence. The rider merely produced his identity card. His name and identity card number were recorded in the police constable's diary. He was respondent No. 1. The pillion-rider did not produce his identity card but gave his name as Hassan bin Haji Sulaiman and his address as 367 Jalan Pasir Bedamar. He was identified as the respondent No. 2. In cross-examination P.W.1 denied that respondent No. 2 was the rider and respondent No. 1 the pillion-rider.

P.W.2, police constable 31252 Yatim bin Lazim, the only other prosecution witness, produced a memo from the Registrar and Inspector of Motor Vehicles certifying that the owner of the moor-cycle was one Hassan bin Sulaiman alias Haji Sulaiman of No. 367A Pasir Bedamar Road, Teluk Anson with NRIC. No. 2101305. This Hassan was in possession of a valid motor-vehicle licence.

The learned magistrate dealt with the second charge in each case in this joint trial in the following manner. He said the prosecution relied on the provisions of section 106 of the Evidence Ordinance but held that before they could be invoked "there must be sufficient evidence leading towards the facts that are within the knowledge of the defendant", and he went on to hold that in the absence of any proof that the police had demanded for the policy of insurance, the charges could not stand.

With respect to him, it appears to me in the first place that the learned magistrate had forgotten the provisions in section 113 Criminal Procedure Code prohibiting the prosecution from adducing in evidence what was said to the police by the accused in the course of police investigation.

In the second, he is wrong in his interpretation of section 106 of the Evidence Ordinance. While this section does not, as it is abundantly clear, cast any burden on an accused person to prove that no crime had been committed by